

IN THE SUPREME COURT OF THE STATE OF DELAWARE

KATHLEEN MARTIN, ¹	§	
	§	No. 148, 2011
Petitioner Below,	§	
Appellant,	§	Court Below—Family Court
	§	of the State of Delaware in and
v.	§	for New Castle County
	§	
JACK MARTIN,	§	
	§	
Respondent Below	§	C.A. No. CN09-06092
Appellee.	§	

Submitted: May 9, 2011
Decided: May 17, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

O R D E R

This 17th day of May 2011, upon consideration of the appellant's motion to stay, the appellee's response in opposition to the motion and the Family Court record, it appears to the Court that:

(1) On March 25, 2011, the appellant filed this appeal from the Family Court's "order regarding custody and visitation" dated February 23, 2011. The order on its face appeared to be a final order. After the Family Court issued the February 23, 2011 order but prior to filing the notice of

¹ By Order dated March 25, 2011, the Court *sua sponte* assigned pseudonyms to the parties. Del. Supr. Ct. R. 7(d).

appeal, the appellant filed a motion for emergency *ex parte* order in the Family Court.

(2) The record reflects that the Family Court held hearings on the appellant's motion for emergency *ex parte* order on March 9 and March 16, 2011. The Family Court also held a teleconference on March 29, 2011 and thereafter issued an order dated March 31, 2011. The March 31, 2011 order expressly clarified that the February 23, 2011 order is not a final order. The March 31, 2011 order also altered the visitation schedule in the February 23, 2011 order pending a further hearing on July 11, 2011.

(3) The appellant asks "that this Court stay this appeal, and retain jurisdiction until a final order is entered by the Family Court." In response, the appellee "opposes a stayed, outstanding issue on appeal, when the case is still pending for final determination after further hearing by the Court below."

(4) The record reflects that the February 23, 2011 order did not finally determine and terminate the cause before the Family Court.² Absent

² "[T]he test of the appealability of an order is not whether the order itself is a final order but whether the order sought to be appealed constitutes a final judgment determining on the merits the entire controversy between the parties and which 'leaves nothing for future determination or consideration.'" *O'Brien v. O'Brien*, 1987 WL 36718 (Del. Supr.) (quoting *Showell Poultry, Inc. v. Delmarva Poultry Corp.*, 146 A.2d 794, 796 (Del. 1958)).

compliance with Supreme Court Rule 42,³ this Court lacks jurisdiction to consider an appeal from the February 23, 2011 order.⁴

NOW, THEREFORE, IT IS ORDERED, pursuant to Supreme Court Rules 29(c) and 42, that the appeal is DISMISSED *sua sponte*.⁵ The motion to stay is moot.⁶

BY THE COURT:

/s/ Randy J. Holland
Justice

³ See Del. Supr. Ct. R. 42 (governing interlocutory appeals).

⁴ *Julian v. State*, 440 A.2d 990 (Del. 1982).

⁵ See Del. Supr. Ct. R. 29(c) (providing for involuntary dismissal, *sua sponte*, without prior notice when appeal manifestly fails on its face to invoke the jurisdiction of the Court and where the Court concludes, in the exercise of its discretion, that the giving of notice would serve no meaningful purpose and that any response would be of no avail).

⁶ The appellant's filing fee in this appeal shall be applied to a future appeal, if any, filed by her following the issuance of a final order by the Family Court in this matter.